In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 83

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

H. B. ZACHRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent states that it "places no especial reliance" on "any supposed doctrine" that "new construction" is exempt from the Fair Labor Standards Act, and that "[d]efinitely * * * the adjective attached to such construction should not be determinative of the ultimate decision" of the coverage issue in this case (Resp. Br., p. 12). Also, respondent concedes that "the language [of the *Vollmer*, *Alstate* and *Lublin* decisions] concerning liberal construction of the Act and the use of practical considerations rather than technical conceptions is, and should be, applicable to all types of cases arising under the Act, whether or not they are 'in commerce' cases" (Resp. Br., pp. 63–64). However, respondent argues for a different,

541625—60

more narrow, scope of coverage in "production" cases on the ground that the main consideration here is the language and intent of the 1949 amended definition of "produced." Thus, respondent rests its case primarily, if not entirely, on its interpretation of the legislative intent of the 1949 amendment to the definition of "production" coverage. And since respondent relies essentially (Resp. Br., pp. 53–55) upon the few cases which the House Conferees' Report stated would be removed from the Act's coverage by the amended language (ignoring the numerous other cases which both House and Senate Reports expressly cited as illustrations of what would still remain covered), this reply brief, supplementing the discussion of legislative history in our Main Brief (pp. 49–53, particularly footnotes 26 and 27), may serve to clarify the significance and effect of the House Report and the cases on which respondent relies.

Apparently in deference to the express legislative approval (by both House and Senate) of *Kirschbaum*, respondent admits that if it had built the dam "to be used for the sole or primary purpose of impounding water for a concern or concerns engaged in the production of goods for commerce, it could with force be argued that Respondent's employees were covered since the dam, like the building in the *Kirschbaum* and *Borden* cases, *supra*, would be intended to have, and would have, basic use in the production of goods for commerce" (Resp. Br., pp. 22–23). But, relying solely on the House Report's examples of "local" enterprises, respondent contends that the legislative intent of the 1949 amendment was to expand the

application of the "logic" of *Callus'* reference to enterprises devoted to "all the usual miscellany" of customers, so as to remove from the Act's coverage "numerous local activities which had theretofore been ruled subject to the Act" (Resp. Br., pp. 48, 55–57). Despite the emphatic disavowal, by both House and Senate Conferees, of any intent to remove "numerous" activities or employees from the Act's coverage,[1] and despite the omission of any reference to *Callus* in either the House or Senate Reports (in contrast to the specific references to *Kirschbaum, Borden,* and several other decisions, see Petitioner's Main Brief, pp. 50–54), respondent infers a legislative intent to tear part of the language of the *Callus* opinion from its context and adopt it as a controlling criterion for drawing the line of coverage.

Admittedly, no inference of legislative disapproval of the *Callus* decision, in the factual circumstances there involved, can be drawn from the legislative silence, but respondent's inference of expression not only misconceives the import of that decision, but is plainly contradicted by the cases which the legislative reports of both Houses expressly specified would remain within the coverage of the amended language. There is, for example, no more striking type of enterprise serving the "usual miscellany" of local cus-

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[1] In addition to the statements quoted in Petitioner's Main Brief, pp. 44–45, see Representative McConnell's explanation of the House Conferees' statement (95 Cong. Rec. 14936):

> I want it very definitely understood, and I have had some estimates of it, that the use of the words "directly essential" and "closely related" will take out from coverage of the Act less than 200,000 workers.

tomers than the public utility cases (which respondent significantly omits to mention)—work which both Senate and House Reports expressly emphasized would remain within the coverage of the amended language (see Petitioner's Main Brief, pp. 50–52).

Examination of the public utility cases and other comparable cases thus specifically endorsed (95 Cong. Rec. 14874–75) conclusively refutes any inference of legislative intent to limit coverage to work on facilities "intended to serve solely and primarily those engaged in the production of goods for commerce." On the contrary, these cases confirm the Congressional purpose to adhere to the well-settled principle that a substantial and regular use in the production of goods for commerce invokes the Act's coverage even though an enterprise may not be predominantly devoted to such interstate use.[2]

Thus, in the *Roland* case (see Petitioner's Main Brief, p. 52, fn. 26), only 33 out of approximately a thousand of the miscellaneous customers were engaged in interstate activities; in *Lewis* v. *Florida Power & Light Co.* (*ibid.*), only about 14% of the company's total electric power was shown to have been furnished customers for use in interstate activities (the percentage does not appear in the court's opinion, but is in the record of that case, R. 13); *Walling* v. *Thompson*,

[2] The Act has consistently been held applicable to employees engaged in work inseparably related to both interstate and intrastate commerce, even though "all of respondent's business is not shown to have an interstate character" (see *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571–572), and even where work may predominantly serve intrastate purposes, as long as it also serves substantial and regular interstate uses. *Walling* v. *Roland Electrical Co.*, 326 U.S. 657; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178; and *Schulte* v. *Gangi*, 328 U.S. 108.

65 F. Supp. 686 (S.D. Cal.), another of the decisions specifically approved by the Senate Report (95 Cong. Rec. 14875), upheld coverage of employees of a firm engaged in installation, repair and maintenance of burglar alarm systems leased to a general miscellany of local customers, only 7.5% of whom were engaged in production of goods for commerce, and in *Walling* v. *Sondock,* 132 F. 2d 77 (C.A. 5)—another case specifically endorsed by the Senate Report—employees of an independent watchmen service agency were held within the coverage of the Act, where only 20% (59 out of 294) (see the district court opinion, *Fleming* v. *Sondock,* 43 F. Supp. 339, 340 (S.D. Tex.)) of the agency's regular customers were engaged in interstate commerce or in the production of goods for interstate commerce, the remainder being local business establishments and private residences.[4]

While the House Report's disapproval of the cases on which respondent relies (see *Schroeder* v. *Clifton* and *McComb* v. *Super-A Fertilizer Works,* Resp. Brief, pp. 53–54) may not, in strictest logic, be consistent with its approval of the utility cases and other types of work whose coverage it agreed would not be affected by the amended language, this possible inconsistency can hardly be construed as overriding the expressed intent to which both House and Senate agreed (not just one House alone), or as superseding the un-

[4] In still another case specifically endorsed by the Senate Report—*Walling* v. *Hamner,* 64 F. Supp. 690 (W.D. Va.)—the fact that a "substantial part" of a saw mill's production consisted of production of mine props or timbers, sold to coal companies for use locally in coal mines producing coal for interstate commerce, was held sufficient to bring the saw mill's employees within the coverage of the Act.

ambiguously expressed intent of the Senate Report with respect to specific cases which the House Conferees "did not choose to speak about."[4] Certainly, the fact that the House Conferees expressed a purpose to exclude from coverage a few specified cases, not consistent with or contemplated by the Senate's expressed intent, does not warrant an inference that it was the intent of the Congress as a whole to narrow coverage even more substantially than the House Report itself specified.

The amended language is obviously not so rigid and inflexible as to require extension of the "logic" of the cases on which respondent relies, in order to give effect to the House Report's intent to exclude the particular cases there mentioned. The furnishing of fertilizer in the *Super-A Fertilizer* case, or rock for the construction of the dike in *Schroeder* v. *Clifton*, or the window-washing in *Martino* v. *Michigan Window Cleaning Co.* (see 95 Cong. Rec. 14929), can

[4] The explanation of the House Report's apparent inconsistency probably stems from the divergent original House and Senate proposals. The amendment finally adopted was a compromise between the Senate view which was opposed to any restriction of coverage, and the House proposal for a more "rigid" restriction of coverage (95 Cong. Rec. 14874, 14936). As explained by Representative McConnell, a member of the House Conference Committee, "the statement accompanying the [House] conference report" tried to clarify the effect of the Conference agreement language by stating "the types of employees * * * who would not be affected by the words 'closely related' and 'directly essential'", but there were "borderline cases we did not choose to speak about; the courts will have to settle them" (*id.* at 14936); at the same time, he emphatically denied that any substantial number of employees would be removed from the Act's coverage by the language agreed to in conference (see *supra*, fn. 1).

reasonably be distinguished on the ground that the specific supplies and services there involved although obviously useful to the production of goods for commerce, were not as vitally and directly essential to the productive process as is the furnishing of water, electricity, fuel, machinery and tools and dies.[4] Further, it should be noted that the House Report, although designating the rock quarry employees in *Schroeder* for exclusion from coverage, did not so designate the employees actually constructing the dike (95 Cong. Rec. 14929). Similarly, although designating for exclusion the local architectural firm's "preparation of plans for the alteration of buildings * * * which are used to produce goods for interstate commerce," the House Report refrained from so designating the actual construction of the alterations (*ibid.*).

Respondent's heavy reliance on the post-1949 "hospital cases" (Resp. Br., pp. 49, 55), and on the peculiarly unique case of *Mitchell* v. *Moore* (*ibid.*),

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[4] Thus, the Administrator's Interpretative Bulletin (excerpts of which are printed in Respondent's Brief, pp. 78–84), undertook to construe the legislative intent in terms of "merely useful guides for determining whether the total situation * * * demonstrates the requisite 'close and immediate tie' to the production of goods," pointing out, *inter alia*, that "in some cases * * * the degree of such essentiality may be a significant factor in determining whether the work is also 'closely related' to such production," that "[n]o one of the factors listed above is necessarily controlling," and some factors "may have more significance than others in particular cases, depending upon the facts"—in short, that "[i]t is the sum of the factors relevant to each case that determines whether the particular activity is 'closely related' to such production" (29 C.F.R. 776.17, quoted in Resp. Br., p. 83).

only serves to indicate the extremes to which respondent would carry its conception of the "logic" of those decisions so as to exclude "numerous" wholly dissimilar activities from the Act's coverage. The Administrator has never construed the amended Section 3(j) as covering maintenance employees of such hospitals* because these hospital maintenance cases reflect the very distinction which Congress drew between facilities only indirectly useful or "necessary" to efficient production and those directly essential to the productive processes.

Finally, respondent's argument, like the opinion of the Court of Appeals below, simply brushes aside a most important practical consideration—that this construction project itself impounds or "produces" the water supply which, admittedly, is necessarily and substantially, if not predominantly, devoted to furnishing the large quantities needed for the functioning of the interstate instrumentalities and the interstate manufacturing industries in Corpus Christi and vicinity. Respondent's specific obligation, under its construction contract, to maintain the existing water supply without interruption (see Petitioner's Main Brief, pp. 5–6) attests to the close, immediate, and essential relationship of an adequate water supply to the continued functioning of such interstate activities. Respondent advances no argument to refute the ground of coverage resting on the principle of the *Alstate* decision, or to distinguish the work here from the oil drilling work held covered in the *Warren-*

* See *Maneja* v. *Waialua Agricultural Co.*, 216 F. 2d 466, at 473 (C.A. 9), reversed on other grounds, 349 U.S. 254.

Bradshaw case (see Petitioner's Main Brief, pp. 60–62). As explicitly pointed out in the House Report:

> The definition [of "produced"] is divided into two parts. The first part, *which the conference bill leaves unchanged,* covers any employee "producing, manufacturing, mining, handling, transporting or in any other manner working on * * * goods" [95 Cong. Rec. 14928, emphasis added].

Employees engaged in such "actual production activities," covered by "the first part" of the definition, were thus left entirely untouched by the amendment (*ibid.*). As pointed out in Petitioner's Main Brief (p. 62), at least to the extent that the water was impounded to supply the needs essential to the functioning of interstate instrumentalities, it was no less actual production of goods "for commerce," in this primary sense, than the preparation of road materials for use in highway improvements, or production of ice for refrigeration of railroad cars.

Respectfully submitted.

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